No. 95-1105

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE CINCINNATI REDS,

Petitioner,

vs.

ROBERT BRIDEWELL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the operator of a professional baseball team, which during its off-season employs approximately 120 employees and participates in the operation of a stadium staging professional football games, operate more than seven months in any calendar year for purposes of the amusement or recreational establishment exemption of the Fair Labor Standards Act?

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STATEMENT OF JURISDICTION

The Complaint was filed on March 26, 1993, in the United States District Court for the Southern District of Ohio alleging a failure to pay time-and-one-half for overtime work under the Fair Labor Standards Act ("FLSA" or "the Act"). Jurisdiction of the District Court was based upon 29 U.S.C. §216, 28 U.S.C. §§1331, 1337.

On May 25, 1993, Petitioner, the Cincinnati Reds ("the Reds"), filed a motion for summary judgment alleging it was exempt from the overtime provisions of the FLSA pursuant to an exemption for amusement or recreational establishments that do not operate more than seven months in any calendar year. 29 U.S.C. §213(a)(3). District Court Judge Herman J. Weber referred the motion for summary judgment to Magistrate Judge Robert A. Steinberg for report and recommendation.

On February 14, 1994, Magistrate Judge Steinberg issued a Report and Recommendation. In his recommendation, Magistrate Judge Steinberg granted the Reds' motion for summary judgment for the years of 1991, 1992, and 1993. However, he found material issues of fact precluded the granting of summary judgment for the year 1990, since the Reds season was extended by the team's participation in the 1990 World Series.

Both Petitioner and Respondents filed motions to review the Report and Recommendation with District Court Judge Weber. On March 24, 1994, District Judge Weber affirmed Magistrate Judge Steinberg's grant of summary judgment to the Reds for the years of 1991, 1992 and 1993, and he granted summary judgment to the Reds for the year 1990.

Respondents appealed to the United States Court of Appeals for the Sixth Circuit on April 22, 1994. On October 12, 1994, the Sixth Circuit issued its opinion reversing and remanding to the District Court. The Sixth Circuit held that the Reds did not qualify for the amusement and recreational establishment exemption to the FLSA because they operated more than seven months during the year. No petition for rehearing was filed.

Petitioner invoked the jurisdiction of this Court to review the judgment of the Sixth Circuit pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 13(a)(3) of the Fair Labor Standards Act, as amended, 29 U.S.C. §213(a)(3), provides in pertinent part:

> (a) The provisions of section 206 [relating to minimum wages] and section 207 [relating to mandatory overtime pay] of this title shall not apply with respect to --
>
> > (3) any employee employed by an establishment which is an amusement or recreational establishment ...if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 percentum of its average receipts for the other six months of such year ...

STATEMENT OF THE CASE

Respondents are cleaning and maintenance employees of Petitioner, the Cincinnati Reds. During the baseball season, Respondents work in excess of 40 hours during some weeks and are not paid overtime compensation.

The Reds operate a major league baseball franchise which conducts 81 regular season home games at Riverfront Stadium, which is owned by the City of Cincinnati. The Reds regular season begins in April of each year and ends in October.

The Cincinnati Bengals, a professional football franchise, also play their home games at Riverfront Stadium. The Bengals' season begins in August and extends to December or January. They play four to six games at Riverfront Stadium between mid-October and December.

The Reds operate the scoreboard and message boards during Bengal home games. They display advertising at Riverfront Stadium year round. They clean the stadium concourse prior to the Bengals' games which occur after the Reds season has ended, and they rent to the Bengals trash removal equipment for use after such games. They also clean private boxes in the stadium after such games. The Reds receive revenues for all of these services.

The Reds also contract for concessionaires to work both Bengals' and Reds' games. The Reds do not receive revenues for concessions sold at Bengals' games, but the Reds have granted Cincinnati Coca-Cola Bottling Company the exclusive right to sell soft drinks at both Reds' and Bengals' games in exchange for advertising rights on Reds' radio broadcasts, in baseball programs, and on signage at Riverfront Stadium.

The Reds employ over 700 employees during the baseball season and approximately 120 employees in the off-season.

REASONS WHY THE PETITION SHOULD BE DENIED

I. AN OPERATOR OF A PROFESSIONAL BASEBALL TEAM WHICH, DURING ITS OFF-SEASON EMPLOYS APPROXIMATELY 120 EMPLOYEES AND PARTICIPATES IN THE OPERATION OF A STADIUM STAGING PROFESSIONAL FOOTBALL GAMES, OPERATES FOR MORE THAN SEVEN MONTHS IN ANY CALENDAR YEAR FOR PURPOSES OF THE AMUSEMENT OR RECREATIONAL ESTABLISHMENT EXEMPTION OF THE FAIR LABOR STANDARDS ACT.

A. The Decision Of The Sixth Circuit Is Not In Conflict With Decisions Of Other Circuits

Petitioner argues that the decision of the Sixth Circuit in the instant case is in direct conflict with the Decision of the Eleventh Circuit Court of Appeals in Jeffery v. Sarasota White Sox, 64 F.3d 590 (11th Cir. 1995). The decisions, however, are not in conflict. Jeffery involved the Sarasota White Sox, a wholly owned subsidiary of the Chicago White Sox. The Sarasota White Sox had a lease to occupy and utilize a sports complex owned by the City of Sarasota, Florida. The Sarasota White Sox played minor league baseball games at the complex from April to August of each year. The Chicago White Sox held spring training in the complex in March of each year.

The Eleventh Circuit held that the Sarasota White Sox met the seasonality requirements of 29 U.S.C. §213(a)(3) for

two of the four years at issue in the case based upon the relative percentages of their receipts during six month periods in prior years. It held that the Sarasota White Sox qualified as a seasonal establishment for the other two years based upon the length of its operation during those years. In measuring the length of the Sarasota White Sox's operation of the Sarasota sports complex, the Eleventh Circuit specifically included the time period that the Chicago White Sox, a separate employer, held its spring training:

> The evidence shows that spring training in the sports complex in Sarasota begins and ends in March of each year. Defendant begins play in April and continues play up to the end of August each year. Accordingly, Defendant's operation at the baseball complex in Sarasota lasts approximately five months each year which is two months less than the seven month period afforded under 29 U.S.C. §213(a)(3).
>
> 64 F.3d at 596

The Jeffery decision also addressed the fact that Plaintiff in that case was employed beyond the seven month exemption period:

> The fact that Plaintiff was employed in the off-season months relative to the preparation and maintenance of the baseball fields does not alter the Court's finding that Defendant's operation does not last longer than seven months in any calendar year. The focus on the exemption is not on the length of time Plaintiff performed his work. Rather, the focus is on length of the Defendant's seasonal operation. It is the

> revenue producing operation of the Sarasota White Sox as a professional baseball franchise which affords it the protection of the exemption. 29 U.S.C. §213(a)(3) does not require Defendant to completely shut down or terminate every employee at the end of each baseball season.
>
> 64 F.3d at 596
> (Internal Citations Omitted)

Petitioner claims this language from the Jeffery decision is in conflict with the reasoning of the Sixth Circuit's decision in the instant case, which states in part:

> While a truly seasonal business that employs an insignificant number of workers year-round could conceivably qualify for the exemption, the fact that the Reds employ 120 year-round workers compels the conclusion that they "operate" year-round.
>
> 68 F.3d at 139
> (emphasis supplied)

Petitioner implies that the Sixth Circuit's decision holds that an employer that arguably is an amusement or recreational establishment operates longer than the seven month exemption period if it employs "some workers" in its off-season. As the introductory clause of the sentence quoted above makes clear, that is not the Sixth Circuit's holding. The Sixth Circuit's decision specifically contemplates the possibility that a seasonal employer might qualify for the exemption despite employing some employees during its off-season.

The Sarasota White Sox of the Jeffery case may be such an employer. The Jeffery decision contains little information about the activities of the Sarasota White Sox during their off-season, but the information it does contain suggests that those activities are limited. In three of the years at issue in Jeffery, the Sarasota White Sox earned $1,106, $2,614, and $323 in receipts during their off-seasons (compared with $476,339, $540,506, and $607,646 during their seasons). The decision also states that the Sarasota White Sox employed the Plaintiff, a groundscrew worker, during their off season, but does not state whether the White Sox employed any other workers during their off-season.

In contrast, the instant case contains substantial information about the activities of the Cincinnati Reds in their off-season, and those activities demonstrate that the Cincinnati Reds continue to operate during the off-season. The Reds employ approximately 120 employees during its off-season. They participate in the operation of Riverfront Stadium at Bengals' home games during November and December by cleaning the Stadium, renting the Bengals' cleaning equipment, operating the scoreboard and message boards, providing contracted for concessions, and exhibiting advertising.

While the Court's opinion places particular emphasis upon the number of workers employed during the Reds' off-season, its conclusion is not based upon that one particular fact:

> It is clear from the stipulated facts that the Reds do indeed operate for more than seven months per year.
>
> 68 F.3d at 139

The Sixth Circuit concluded that the Cincinnati Reds continued

to operate during their off-season. The stipulated facts of the case demonstrate that the Reds participate in the operation of Riverfront Stadium during their off-season for purposes of staging professional football games. The conclusion that the Reds continue to operate during their off-season through such activities is consistent with the Eleventh Circuit's conclusion that the Sarasota White Sox's operation of the Sarasota sports complex included the exhibition games played there by the Chicago White Sox.

The decisions of the Sixth Circuit in the instant case and the Eleventh Circuit in Jeffery are not in conflict. Neither decision holds that an amusement or recreational establishment operates more than seven months by employing some workers in its off-season. Both decisions find that an alleged amusement or recreational establishment's operation includes its participation in the operation of a sports stadium that is staging sporting events of another employer.

B. The Decision Of The Sixth Circuit Is Consistent With Established Precedent

Petitioner claims that the Sixth Circuit decision in the instant case is at odds with well established precedent interpreting the amusement or recreational establishment exemption. The cases cited by Petitioner in support of this proposition, however, do not hold that an employer can qualify for the existing amusement or recreational exemption while continuing to operate during its off-season to the extent that Petitioner does.

Wirtz v. Freehold Racing Assn., 17 Wage & Hour Cases 308 (BNA) (D.NJ. 1966) was decided under the Fair Labor Standards Act prior to the 1966 amendment creating the current

exemption for amusement and recreational establishments. Prior to that amendment, the FLSA contained an exemption for seasonal amusement and recreational establishments that was a constituent part of the exemption for retail establishments. The exemption required such an establishment to be a retail establishment and, in addition, to be an amusement or recreational establishment that operated on a "seasonal basis." It did not require the amusement or recreational establishment to meet objective tests of its receipts during a six month period to be less than 33% of its earnings in the other six months or not to operate for more than seven months, as required by the current exemption. Freehold Racing Association does not interpret the current exemption's requirement that an amusement or recreational establishment not operate more than seven months in any calendar year.

Wage and Hour Opinion Letter No. 1361, Lab. L. Rep. (CCH) ¶30,974 (January 24, 1975) [June, 1973-September, 1978 Transfer Binder], does apply the current exemption for amusement and recreational establishments, but does not allow such an establishment to operate for more than seven months. The opinion letter states that a city beach, which was open less than seven months per year, may qualify for the exemption, despite employing some life guards beyond seven months, maintaining equipment:

> [t]he fact that some of the life guards work more than seven months in the year maintaining the equipment would not serve to deny the exemption under section 13(a)(3) provided the establishment (the beach) is not open as a recreational facility (i.e., protected swimming) for more than seven months in any calendar year.

It is clear from this Opinion Letter that the beach was not open more than seven months per year, and there is no indication in the Opinion Letter that the beach operated in any other fashion beyond the seven month period. The holding that the beach was not disqualified from the exemption on the basis of employing some workers during its off season is not at odds with the Sixth Circuit's decision in the instant case.

Hodgson v. Yellowstone Park Lines, 21 Wage & Hour Cases (BNA) 32 (D.Wyo. 1972) rev'd, sub. nom. Brennan v. Yellowstone Park Lines, Inc., 478 F.2d 285 (10th Cir. 1973) cert. denied, 414 U.S. 909, 94 S.Ct. 228, 38 L.Ed.2d 147 (1973) involved two companies that operated hotels, inns, lodges, cabins, and restaurants in Yellowstone National Park. On appeal, the Tenth Circuit held that because of the geographical distance between the facilities, each facility was a separate establishment, and only those employees employed by one of the individual facilities were exempt from overtime compensation. Certain "central employees" (office, laundry, print shop, warehouse, garage, ice plant, fire watch, and maintenance and repair) who provided services to more than one of the facilities were held not covered by the exemption. 478 F.2d at 290.

The Tenth Circuit noted in a footnote that "It is undisputed that defendants meet the seasonal requirements of §213(a)(3)." 478 F.2d at 287, ftnt. 1. The District Court decision demonstrates why that issue was not disputed: each of the facilities opened on or after May 7 and closed on or before October 11. 21 Wage & Hour Cases (BNA) at 34. In addition, the District Court held that the companies' overall Yellowstone operation, which the District Court treated as a single establishment, met the receipts test of §213(a)(3)(B). Their receipts during the season were 98% of their total receipts. Id. Given this overall percentage of seasonal receipts, it is probable

that the individual facilities, which the Tenth Circuit found to be separate establishments, would also have met the receipts test.

Petitioner notes that Defendants in Yellowstone Park Lines employed approximately 50 workers during the off-season (as compared with over 2000 during the season). Nothing in either the District Court's or Circuit Court's decisions suggests that any off-season employees were employed by the individual facilities that the Tenth Circuit found to be separate establishments.

The cases Petitioner cites as being at odds with the decision of the Sixth Circuit all concern the employment of workers by an alleged amusement or recreational establishment during its off-season. None of those cases involved an establishment that continued to operate a business beyond the seven month exemption period. Those cases are not at odds with the decision of the Sixth Circuit in the instant case.

C. The Decision Of The Sixth Circuit Is Consistent With Congressional Intent In Amending The Exemption For Amusement Or Recreational Establishments

Prior to 1966, the Fair Labor Standards Act contained an exemption for certain retail or service establishments which included some amusement or recreational establishments. Section 213(a)(2) then provided as follows:

> (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment --

(i) is not in an enterprise described in section 203(s) of this title, or

(ii) is in such an enterprise and is a hotel, motel, restaurant, or motion picture theater; or is an amusement or recreational establishment that operates on a seasonal basis, or

(iii) is in such an enterprise and is a hospital, or an institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective, residing on the premises of such institution, or a school for physically or mentally handicapped or gifted children, or

(iv) is in such an enterprise and has an annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) which is less than $250,000.

A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;

29 U.S.C. §213(a)(2)
(pre 1966 amendment)
(emphasis supplied)

An amusement or recreational establishment could qualify for

this exemption by meeting the definition of a retail or service establishment, by being an enterprise engaged in commerce within the meaning of Section 203(s) of the Act, and by operating on a "seasonal basis". The 1966 amendment removed amusement and recreational establishments from the retail and service establishment exemption and preserved it as a separate exemption. It also replaced the general requirement of operating on a seasonal basis with the requirement of meeting one of two specific and objective tests. Under the post-1966 amended FLSA, an amusement or recreational establishment cannot qualify for an exemption unless:

> "(A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year..."
>
> 29 U.S.C. §213(a)(3)

It is well established that exemptions to the Fair Labor Standards Act are to be narrowly construed. Phillips, Inc. v. Walling, 324 U.S. 492, 65 S.Ct. 807, 89 L.Ed. 1095 (1945). The Sixth Circuit's decision narrowly construes Section 213(a)(3)(A) to literally require an amusement or recreational establishment not to operate more than seven months in any calendar year in order to qualify for the exemption.

Petitioner requests Section 213(a)(3) be interpreted to allow Petitioner to, among other things, perform functions relating to the staging of football games during its off-season and still qualify for the exemption. Such continued operation is inconsistent with a narrow construction of Section 213(a)(3), and conflicts with Congressional intent of establishing an

objective and definite tests to replace the requirement of operating on a seasonal basis.

Petitioner contends that the Sixth Circuit's decision would require an amusement or recreational establishment to close down its business and discontinue operations after seven months in order to qualify for the exemption. Such is not the case. An amusement or recreational establishment that chooses to operate after seven months can qualify for the exemption by meeting the receipts test of Section 213(a)(3)(B). An establishment that cannot meet that test because its "off-season" operations are too substantial is not truly seasonal and under the FLSA is not entitled to an exemption.

Finally, Petitioner contends that the decision of the Sixth Circuit would adversely affect the operations of numerous professional sports organizations. There is no evidence in the record of any professional sports organization other than Petitioner that refuses to pay overtime compensation to its maintenance and cleaning employees. There is no reason to believe any other professional sports organization denies such employees overtime compensation. The vast majority of such organizations would be ashamed to deny overtime compensation to ordinary workers who clean up the trash that fans leave behind, even as those organizations are throwing millions of dollars at star athletes and pocketing millions for themselves. Petitioner requests this Court to hold that the laws of the United States allow them to treat employees in that way. The Court should not do so.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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